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In The

Supreme Court of the United States

October Term, 1998

HECLA MINING COMPANY,

Petitioner,

v.

WASHINGTON WILDERNESS COALITION, OKANOGAN HIGHLANDS ALLIANCE, and ATLANTIC STATES LEGAL FOUNDATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, INC., AND ALASKA MINERS ASSOCIATION IN SUPPORT OF PETITIONER

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IDENTITY AND STATEMENT OF INTEREST OF THE *AMICI CURIAE*

This brief of *amici curiae*, the Chamber of Commerce of the United States of America, *et al.*, is submitted in support of the petition for writ of certiorari filed by Hecla Mining Company. Like Petitioner, *amici* submit that the Court should grant the petition and decide whether the lower courts should continue to hold prevailing defendants to a much higher standard than that applied to prevailing plaintiffs when ruling on a request for attorney's fees in environmental citizen suits.[1]

Amicus Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector and region. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees. The Chamber regularly advocates its members' views in court on environmental issues of national concern to the business community.

Amicus the National Association of Manufacturers is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the National Association of Manufacturers through its Associations Council and National Industrial Council.

Amicus the National Mining Association is the national trade association for the mining industry whose members are the producers of most of America's coal, metals, industrial

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[1] Pursuant to Rule 37 of the Rules of this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court. Additionally, pursuant to Rule 37, this brief was authored, prepared and paid for in its entirety by the *amici*.

and agricultural minerals. Its members also include manufacturers of mining and mineral processing machinery, equipment and supplies, as well as engineering firms and financial institutions that serve the mining industry.

Amicus Corporate Environmental Enforcement Council ("CEEC") is an organization of 25 diverse companies with a strong commitment to the environment and environmental compliance. CEEC focuses exclusively on environmental enforcement and compliance issues, working to ensure that environmental enforcement is consistent with our environmental laws and advances the goals of those laws.

Amicus American Forest & Paper Association, Inc. is a non-profit trade association for over 250 member companies engaged in growing, harvesting, and processing wood and wood fiber and manufacturing pulp, paper and paperboard products from both virgin and recycled fiber, and solid wood products. Its member companies account for over eight percent of the total U.S. manufacturing output.

Amicus Alaska Miners Association ("AMA") is a non-profit corporation whose members include individuals and companies engaged in the exploration, development and mining of Alaska's coal and hard mineral resources, as well as supporting industries. The purpose of the AMA is to promote the mining industry and development and use of Alaska's mineral resources.

SUMMARY OF ARGUMENT

Amici are trade associations or representatives of industries and businesses that have demonstrated a commitment to public health and the environment as well as a fair and even-handed enforcement of environmental laws. Their members are the industries and businesses charged with the important duty of complying with environmental laws and regulations and therefore have a keen awareness and interest in compliance and fair enforcement.

In the environmental area, Congress has mandated a two-tiered enforcement approach. The primary enforcers are the Executive Branch, through the EPA and the Department of

Justice, and the individual states, who have been delegated some of the authority to administer many of the congressionally-created programs. A secondary and carefully limited enforcement role is accorded to private citizens, who may bring citizen actions, after notice to an alleged offender and an opportunity to cure. Congress was wary of providing too much authority to citizen enforcers and ensured that citizens were not to be co-equals of the government authorities.

In enacting these citizen suit provisions, Congress also provided for fee-shifting to encourage the bringing of meritorious actions but also to discourage the filing of actions that result in little or no benefit to the environment. These fee shifting provisions are neutral on their face, favoring neither citizen plaintiffs nor regulated defendants.

At issue here are the fee-shifting provisions of the Clean Water Act ("CWA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which grant discretion to the district courts to award attorney's fees to a prevailing party in a citizen action without distinguishing between prevailing plaintiffs and defendants. Unfortunately, the Court of Appeals for the Ninth Circuit below, relying on *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), engrafted onto these neutral provisions a barrier to prevailing defendants when they seek their fees: a prevailing defendant may recover its fees only if the plaintiff's action is frivolous or without foundation – essentially applying the Rule 11 standard to prevailing defendants' fee petitions. There is simply no indication in either the language of the statutes or their legislative history that Congress intended such a distinction.

The importance of this Court's review of the decision below is underscored by the huge number of companies and industries potentially affected by this issue. For example, over 900,000 facilities are subject to reporting requirements of the Emergency Planning and Community Right-to-Know Act ("EPCRA"). 62 Fed. Reg. 23834, 23884-85 (May 1, 1997); 61 Fed. Reg. 67017, 67018 (Dec. 19, 1996); *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, at 49

(June 1991) GAO/RCED 91-121. Over 130,000 facilities are regulated under the discharge permitting requirements of the CWA.[2] Over 25,000 facilities are subject to the Title V permitting requirements of the Clean Air Act ("CAA"). 61 Fed. Reg. 30061, 30062 (June 13, 1996). Almost 21,000 generators of hazardous waste and 2,000 treatment, storage and disposal facilities are subject to the standards and permitting requirements of the Resource Conservation and Recovery Act ("RCRA"). *Executive Summary/The National Biennial RCRA Hazardous Waste Report (Based on 1995 Data)*, August 1997, at ES-3, 4 (available at www.epa.gov/epaoswer/hazwaste/data/br95). All of these entities, being subject to environmental regulation, are also potentially subject to environmental citizen suits and their fee-shifting provisions.

Amici recognize the citizen enforcement role, and where citizen plaintiffs are successful, the discretion of the court to award attorney's fees. But *amici* also recognize that their members might be and have been forced to defend citizen claims and, when successful, should not automatically be denied their fees. The importance of the question presented to the Court is underscored by the huge number of companies and industries that are subject to environmental regulation, and that, therefore, are also subject to environmental citizen suits and their fee-shifting provisions. In short, *amici* simply ask that the district courts be allowed to exercise their discretion when determining whether an award of attorney's fees is appropriate under the environmental fee-shifting provisions.

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[2] Based on a telephone conversation with Mr. Brian Rittenhaus of the EPA Office of Wastewater Management/Permits Division.

ARGUMENT

I. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION TO DECIDE WHETHER THE DUAL STANDARD SHOULD CONTINUE TO BE USED IN AWARDING ATTORNEY FEES UNDER THE ENVIRONMENTAL FEE-SHIFTING STATUTES

A. Congress Intended That the District Courts Would Exercise Their Discretion When Awarding Attorney's Fees in Environmental Citizen Actions

In enacting the fee-shifting provisions of the CWA and CERCLA, the statutes at issue here, Congress did not distinguish between prevailing plaintiffs and defendants. It rejected a dual standard and instead opted for neutral language, providing that the district courts may award costs of litigation "to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 33 U.S.C. § 1365(d), 42 U.S.C. § 9659(f). Nor did Congress distinguish between prevailing plaintiffs and defendants in the fee-shifting provisions of other environmental statutes, likewise providing the district courts with discretion to determine when an award of fees is appropriate.[3]

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[3] Congress also used the "prevailing or substantially prevailing party, whenever the court determines such an award is appropriate" language when it enacted the RCRA, 42 U.S.C. § 6972(e), and EPCRA, 42 U.S.C. § 11046(f). Under the CAA, 42 U.S.C. § 7607(f), Toxic Substances Control Act, 15 U.S.C. § 2618(d), and Endangered Species Act, 16 U.S.C. § 1540(g)(4), Congress provided that the district courts may award fees "whenever it determines such an award is appropriate." Although the "prevailing party" language is absent from these provisions, this Court in *Ruckelshaus v. Sierra Club*, 462 U.S. 680 (1983), examined this language and held that only prevailing parties are eligible for fee awards. Thus, under *Ruckelshaus*, the differences in the language Congress used are of no consequence and the fee-shifting provisions of the environmental statutes are to be interpreted identically – a court may award fees to "the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate."

Despite Congress using this neutral language, the Ninth Circuit and other courts have engrafted onto these fee-shifting provisions a much higher standard when a prevailing defendant seeks to recover its fees. *See, e.g., Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995) (in CWA and RCRA suits, prevailing defendant may not recover its fees unless plaintiff's action was frivolous or without foundation); *National Wildlife Federation v. Consumers Power Co.*, 729 F. Supp. 62, 65 (W.D. Mich. 1989) (same in CWA suit); *Consolidated Edison Co. v. Realty Investments Assocs., L.P.*, 524 F. Supp. 150, 153 (S.D.N.Y. 1981) (same under CAA).[4] There is simply no indication, however, that Congress intended the stricter standard to apply to a petition for attorney's fees brought by a prevailing environmental citizen suit defendant. To the contrary, the language of the statutes endorses, if anything, an even-handed treatment of prevailing plaintiffs and defendants and shows, at the very least, that Congress left to the district courts' discretion to determine when it was appropriate to award fees to a prevailing defendant.

Nor does the legislative history of the environmental fee-shifting provisions provide any support for the dual standard. As Petitioner points out, an early version of the CWA mandated that prevailing plaintiffs receive their attorney's fees. Congress deleted this language, however, and replaced it with the neutral provision authorizing the district courts to award fees to either prevailing party. Cert. Pet. 14.

Also, in debating the wisdom of giving such unprecedented enforcement authority to private citizens, some members of Congress questioned whether some plaintiffs would use the citizen suit provisions to bring "frivolous and harassing actions." To deter this abuse, Congress provided that the courts could award fees to either party "whenever the court

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[4] Other courts have even gone beyond the *Christiansburg* standard and injected an element of "bad faith." Still others apply a modified *Christiansburg* approach. *See* Cert. Pet. 23-24. The result is an unclear area of the law that warrants this Court's review.

determines such an action is in the public interest." *Reprinted in Natural Resources Defense Council v. Train*, 510 F.2d 692, 725-26, 728-29 (D.C. Cir. 1974) (relevant legislative history of CAA of 1970).[5] As in the statutes, there is simply no indication in the legislative history that Congress intended to limit the district courts' discretion in determining whether an award of fees is appropriate.

The best indicator of congressional intent is, of course, the language of the statutes. And, it is clear that Congress did not limit prevailing defendants to an award of fees, as it has done under several other statutes (*see* Section I.B., below), only if a plaintiff's action is frivolous or without foundation. The Ninth Circuit has run afoul of the principal canon of statutory construction: when the text of a statute is clear, the court's interpretive inquiry ends. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

B. Congress Could Have Easily Mandated the Dual Standard

Had Congress wished to apply a dual standard to fee petitions brought by prevailing environmental citizen suit defendants, and thus condition the award of fees on certain behavior of the plaintiff, it easily could have done so. The Ninth Circuit's standard ignores the many instances where Congress has adopted the dual standard when it wished to make it more difficult for the prevailing defendant to recover its attorney's fees. For example, the Administrative Procedure Act expressly provides that costs of litigation, including attorney's fees, may be awarded to the substantially prevailing party, "except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes." 5

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[5] Nothing in the legislative history indicates that prevailing defendants should recover their fees "only where the action may be fairly characterized as frivolous or harassing," as one court misread the history. *Consolidated Edison*, 524 F. Supp. at 153.

U.S.C. § 552b(i). Likewise, in certain antitrust cases, district courts shall:

> (1) award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee, or
>
> (2) award to a substantially prevailing party defending against any such claim the cost of suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

15 U.S.C. § 4304(a); *see also* 15 U.S.C. § 15c(d) (in antitrust actions brought by a state, court may award fees to prevailing defendant if "the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."); 31 U.S.C. § 3730(d)(4) (in *qui tam* actions, court may award fees to prevailing defendant if plaintiff's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."); 42 U.S.C. § 11113 (in antitrust actions under Health Care Quality Improvement Act, court shall award fees to prevailing defendant if plaintiff's claim was "frivolous, unreasonable, without foundation, or in bad faith."); 49 U.S.C. § 60121(b) (under Pipeline Safety Act, court may award attorney's fees to any prevailing plaintiff, but may award fees to prevailing defendant only "when the action is unreasonable, frivolous, or meritless.") In contrast, although it easily could have, Congress did not so distinguish between prevailing plaintiffs and prevailing defendants when it enacted the CWA and CERCLA, as well as other environmental statutes, illustrating that it rejected the dual standard adopted here by the Ninth Circuit.

By advancing the one-sided "frivolous or without foundation" standard, the Ninth Circuit has effectively ruled that a prevailing environmental citizen suit defendant may recover its fees only when the plaintiff's action violates Rule 11. *See* Fed. Rule Civ. Proc. 11(b) (a plaintiff violates Rule 11 if its complaint is frivolous or without support). Consequently, apart from disregarding the clear language of the statutes, the

Ninth Circuit's standard is additionally questionable because it is already established under Rule 11 that a prevailing defendant may be awarded its fees if a complaint is frivolous or without foundation, even in the absence of a fee-shifting provision.

Under a nearly identical fee-shifting statute, the Copyright Act, this Court recently found that prevailing plaintiffs and defendants must be treated alike. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). Similar to the environmental statutes, the Copyright Act provides that "the court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. This Court found that the statutory language gave "no hint that successful plaintiffs are to be treated differently from successful defendants." *Id.* at 522.

This Court also found that the legislative history of the Copyright Act "provides no support for treating prevailing plaintiffs and defendants differently with respect to the recovery of attorney's fees." *Id.* at 523. As noted above, the legislative history of the environmental provisions likewise provides no support for the Ninth Circuit's position that prevailing plaintiffs and defendants should be treated differently. Here we have essentially identical language receiving vastly different treatment: this Court found that the neutral language of the Copyright Act must be given an even-handed interpretation, while the courts construing the same language of the environmental statutes have concluded that a harsh, dual standard should be applied.

Accordingly, the language of the statutes, their legislative history, and this Court's ruling in *Fogerty* contradict the Ninth Circuit's decision. The Court should grant Hecla Mining's petition to resolve the uncertainty created by the conflicting interpretations of this congressional language.

II. THE FACTORS THAT MOTIVATED THIS COURT IN *CHRISTIANSBURG* ARE NOT PRESENT HERE

The Ninth Circuit, with no analysis, adopted the standard articulated by this Court in *Christiansburg* as the standard to be applied to environmental fee-shifting provisions. *Razore*, 66 F.3d at 240 (where the Ninth Circuit simply stated that, "We agree with the district court that *Christiansburg*" is the proper standard).[6] Other courts have also unhesitatingly adopted *Christiansburg*. *See*, *e.g.*, *National Wildlife*, 729 F. Supp. at 64. In *Christiansburg*, this Court was asked to decide what standard should apply to a claim for attorney's fees by a prevailing defendant in a Title VII employment case. Focusing on congressional policy that Title VII plaintiffs were "the chosen instrument of Congress" to enforce civil rights laws, this Court held that prevailing Title VII defendants may recover their fees only if the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 418, 421.

In *Fogerty*, the respondent contended that *Christiansburg* supported different treatment for prevailing plaintiffs and defendants. *Fogerty*, 510 U.S. at 522. Finding that the objectives of the Copyright Act and Civil Rights Act were "not completely similar," this Court easily distinguished *Christiansburg*. In particular, the Court stressed that in the civil rights context:

> impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees. . . . In the copyright context, it has been noted that "[e]ntities which sue for copyright

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[6] In this case, the Ninth Circuit simply referred to *Razore* as the "settled law of this circuit." Cert. Pet. 4a.

> infringement as plaintiffs can run the gamut from corporate behemoths to starving artists. . . .

Id. at 524 (citation omitted).

Here, Respondents most surely will maintain that *Christiansburg* should also inform a district court's discretion when it is asked to rule on a prevailing environmental citizen suit defendant's petition for attorney's fees. As this Court found with Copyright Act suits, the policy considerations at work in *Christiansburg* are also absent in most environmental citizen litigation. In civil rights cases, the plaintiff is typically an individual or class of individuals seeking to vindicate personal rights against an employer, municipality, or other entity with greater resources. In environmental citizen litigation, on the other hand, plaintiffs are often large, well-funded organizations devoted to bringing lawsuits.

In this case, the district court aptly found that, "Plaintiffs are public interest groups, but they are also professional litigants." Cert. Pet. 50a. Indeed, citizen plaintiffs draw financial support from huge memberships and, bolstered by the environmental fee-shifting provisions, have used those contributions to bring thousands of lawsuits under the environmental statutes.[7] Consequently, the kind of plaintiff bringing environmental citizen litigation often resembles much more the "behemoth" noted in *Fogerty* than the impecunious plaintiff that influenced the Court in *Christiansburg*.

Some courts have applied the *Christiansburg* standard to prevailing citizen suit defendants seeking their fees because they did not want to unreasonably deter citizen plaintiffs from bringing meritorious actions. *See*, *e.g.*, *National Wildlife*, 729

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[7] Perhaps energized by the fee-shifting provisions, typical citizen plaintiffs are hardly ever individuals, but rather large, well-funded, national organizations. Today, the Natural Resources Defense Council has more than 170,000 members nationwide. The Sierra Club has more than 500,000 national members. State Public Interest Research Groups have over 1 nillion members. They, and many others, are extremely active in environmental litigation. *See* Brief *Amici Curiae* of Natural Resources Defense Council, et al., *Steel Co. v. Citizens for a Better Env't*, No. 96-643, at 1 n. 2.

F. Supp. at 64. However, this concern is misplaced because a court may consider, as part of the exercise of its discretion, whether a fee award to a prevailing defendant in a particular case would unfairly burden a plaintiff or have any "chilling effect" on potentially deserving plaintiffs.[8] Therefore, even if Congress intended to avoid such an effect, there is no need to read into these statutes a requirement that a prevailing defendant *automatically* be denied its fees unless it demonstrates that the plaintiff's action violated Rule 11. *See also Fogerty*, 510 U.S. at 535 n. 19 (factors that may be used to guide a district court's discretion include "motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.")

III. THE COURT SHOULD GRANT THE PETITION BECAUSE THE NINTH CIRCUIT'S DECISION PERMITS CITIZEN PLAINTIFFS TO ENCROACH UPON THE EXECUTIVE BRANCH'S ENFORCEMENT AUTHORITY

By enacting environmental citizen suit provisions, Congress decided that citizens may act as private attorneys general and aid in enforcing environmental laws. Congress did not, however, place citizen plaintiffs on an even plane with Executive Branch enforcement officials and endow them with the full panoply of Article II enforcement authority. Rather, Congress limited citizen enforcement in several significant ways. It required a would-be citizen plaintiff to first provide notice of the alleged violation to the EPA, the state and the alleged violator at least 60 days before filing suit. *See, e.g.*, 33 U.S.C. § 1365(b)(1)(A). The purpose of the notice period is two-fold: (1) it gives the alleged violator the opportunity to

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[8] The parties' resources is but one factor a court could consider in deciding whether an award of fees is appropriate. *See, e.g., Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 828-31 (7th Cir. 1984) (one of the factors district court may consider in awarding fees to an ERISA prevailing defendant is plaintiff's ability to pay).

bring itself into compliance, thus rendering a citizen suit unnecessary; and (2) it also allows the government the opportunity to determine whether it should utilize its own authority to enforce compliance, which likewise bars a citizen suit. *Hallstrom v. Tillamook County*, 493 U.S. 20, 29-31 (1989); *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987). Similarly, to ensure that remediation of contaminated waste sites will not be hindered by the "potentially intrusive" citizen plaintiff, *see Gwaltney*, 484 U.S. at 61, Congress prohibited citizen suits where the EPA is already undertaking removal or remedial action at a site. 42 U.S.C. § 9613(h). Further, a citizen plaintiff may not recover civil penalties (or any type of damages) for itself. Rather, these penalties are payable to the United States Treasury. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1018 (1998).

The various checks on environmental citizen enforcement demonstrate that Congress was not interested in simply maximizing the number of citizen suits brought under environmental statutes. This Court has long noted that, while Congress provided for citizen participation in enforcing environmental laws, Congress intended citizen suits only "to supplement, not supplant, governmental action." *Gwaltney* 484 U.S. at 60. And while in the civil rights context Congress sought to maximize citizen litigation to eradicate discrimination, in authorizing environmental citizen suits Congress sought "to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. The policies served by the CWA and CERCLA (and the other environmental statutes) are "more complex, more measured than simply maximizing the number of" citizen suits. *See Fogerty*, 510 U.S. at 526. Far from being Congress's "chosen instrument" to enforce environmental laws – which remain the federal and state environmental agencies – Congress relegated the citizen plaintiff to a much-restricted, secondary role.

If the dual standard is allowed to prevail, citizen suit defendants will continue to be deterred from fully litigating meritorious defenses because they are faced with payment of

plaintiff's fees if they are unsuccessful and, on the other hand, have no expectation that they will be able to recover their own attorney's fees, no matter how meritorious and successful their defenses. It often simply makes more business sense to settle quickly on the plaintiff's terms and avoid protracted litigation that may lead to paying both parties' attorney's fees (in addition to sizable civil penalties). This puts a citizen suit defendant in a lose-lose situation. If it loses, it must not only pay the plaintiff's attorney's fees, it must also pay its own. And if it wins, it still must pay its own attorney's fees (except in the rare case where the plaintiff violates Rule 11). "Indeed, if there is any difference between the [plaintiff and defendant] we must remember that it wasn't the defendant who chose to litigate." *Cohen v. Virginia Electric & Power Co.*, 617 F. Supp. 619, 622 (E.D. Va. 1985) (holding that prevailing copyright plaintiffs and defendants should be treated alike when awarding fees), *aff'd on other grounds*, 788 F.2d 247 (4th Cir. 1986).

In enacting these fee-shifting statutes, Congress clearly intended to alter the American Rule, albeit by providing the district courts with the discretion to determine when a fee award is appropriate. The Ninth Circuit has distorted that intent by fashioning an "enhanced British Rule," whereby a prevailing plaintiff almost always gets its fees while the prevailing defendant almost never does. Given this imbalance in litigation strengths, a plaintiff has an incentive to adopt uncompromising positions knowing that the defendant is faced with a "running meter" and always has to consider the possibility of having to pay both sides' attorney's fees.

Allowing the district courts to exercise their discretion in determining when an award of attorney's fees is appropriate would force citizen plaintiffs to consider more critically whether bringing a suit will actually further the public interest. In the instant action, the district court essentially found that plaintiffs had no legitimate reason to file their action because the Washington Department of Ecology had already taken the appropriate steps to address any environmental harm that could result from the discharges at issue:

> This action turned awkward on the eve of trial. It became less of a public interest case after plaintiffs abandoned their claim for injunctive relief. As the evidence unfolded, it appeared even less of a public interest case. . . . The point of this suit was not to close the Aspen Pond and save the environment. DOE had already done that.

Cert. Pet. 19-20. Eliminating the automatic prohibition on a defendant recovering its fees would serve and further Congress's intent that citizen plaintiffs be encouraged to bring actions that benefit the environment and discouraged from filing actions that are of marginal or no value to society.

It is important that defendants not be chilled from asserting their rights because one major purpose of litigating defenses to citizen suits is to define the scope of citizen suit enforcement authority. *See, e.g., Steel Co.* 118 S. Ct. 1003 (an interest in attorney's fees or civil penalties does not afford citizen plaintiff standing to sue); *Hallstrom*, 493 U.S. 20 (citizen plaintiff must strictly comply with statutory notice requirements before bringing suit); *Gwaltney*, 484 U.S. 49 (Congress did not intend that citizen plaintiffs be allowed to sue for past violations). If citizen suit defendants are hesitant to fully litigate meritorious defenses, the congressional mandate that citizen plaintiffs only supplement governmental enforcement authority will be undermined. Maintaining the dual standard allows citizen suit plaintiffs to assume an enforcement role larger than that intended by Congress because, given the prospect of paying the, often substantial, attorney's fees of both parties, defendants often find themselves compelled to yield to the citizen plaintiff's demands. If the decision below is allowed to stand, the finely-crafted congressional balance between governmental and citizen enforcement authority will continue to be thwarted by the inappropriate incentives created by the dual standard.

Congress recognized the basic principles of fairness and the balance between the interests of citizen plaintiffs and government enforcement when it enacted the fee-shifting provisions with no distinction between prevailing plaintiffs and defendants. Under the Ninth Circuit's dual standard, however,

a citizen suit defendant who helps to define the proper scope of citizen suit enforcement by maintaining meritorious defenses is unable to recover its attorney's fees. To maintain the proper citizen plaintiff's role and ensure that it does not encroach upon the Executive's authority, this Court should grant the writ and decide whether the dual standard is appropriate for environmental citizen actions. As with copyright law, it is important that the boundaries of private citizen suit enforcement authority "be demarcated as clearly as possible." *Fogerty*, 510 U.S. at 527.

In the past, the Executive Branch has expressed concern that citizen plaintiffs may have replaced government officials as the party that controls enforcement policy. When Congress was considering the reauthorization of the Clean Water Act in 1987, the Department of Justice testified that the flood of private enforcement actions under the CWA was coming dangerously close to producing the result Congress apparently meant to prevent – a shift of control over enforcement from the government to private parties. *See* Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in *Environmental Politics: Public Costs, Private Rewards* 105, 120 (Praeger Publishers 1992). These concerns are just as legitimate today because citizen organizations continue to file hundreds of citizen suits, the fee-shifting provisions sometimes being used as a thinly-veiled fund-raising mechanism. Cert. Pet. 2 n. 2; Greve, *Private Enforcement*, at 109-110.

Courts can play their role only when construing cases and controversies arising under the environmental laws. But with a dual standard applied to requests for attorney's fees, citizens suit defendants with meritorious defenses are discouraged from asserting those defenses, finding a greater than usual incentive to settle. The plaintiffs' incentives to settle, however, is diminished because it can drive a hard bargain knowing that the defendant faces the prospect of paying double fees if its defenses fall short. Additionally, given the dual standard, citizen plaintiffs are also encouraged to bring

cases of questionable merit or of doubtful value to the environment, cases that the EPA would decline to pursue.[9] Consequently, the congressionally crafted balance between government and citizen enforcers is harmed, and citizen plaintiffs are able to arrogate power that Congress never envisioned.

"A fair adversary process presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg*, 434 U.S. at 419. "Defendants who seek to advance a variety of meritorious . . . defenses should be encouraged to litigate them to the same extent that Plaintiffs are encouraged to litigate meritorious claims." *Fogerty*, 510 U.S. at 527. By not distinguishing between prevailing plaintiffs and defendants, Congress intended to maintain this balanced adversary process by giving both plaintiff or defendant the fair opportunity

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[9] The EPA acknowledges that even properly operated and maintained facilities will sometimes violate their permitted limits. *See*, *e.g.*, *United States v. Marine Shale Processors*, 81 F.3d 1329, 1336 (5th Cir. 1996) (the EPA's Training Manual for NPDES Permit Writers concedes that a properly operated facility has only "a 95 to 99 percent chance of complying with its permit limits."); 47 Fed. Reg. 52006, 52018 (Nov. 18, 1982) (even at properly designed and operated facilities, certain effluent limits will result in three to four violations each year because of the statistical method used by the EPA to select the limits). Because the EPA knows that violations will result despite the best intentions and equipment, it will "exercise prosecutorial discretion" and not seek penalties for every violation. In exercising its discretion, the EPA considers factors such as the harm posed by a violation, the possibility of recurrence and the facility's compliance history. *See*, *e.g.*, 62 Fed. Reg. 8314, 8118 (Feb. 24, 1997); 47 Fed. Reg. at 52018 (although CWA is a strict liability statute, enforcement by the EPA is discretionary and, "We have exercised and intend to exercise that discretion in a manner that recognizes and promotes good faith compliance efforts.") In contrast, the citizen prosecutor is not bound to follow the Agency's enforcement policies or the U.S. Constitution and has no economic interest in settling for less than the maximum amount possible. *See* Greve, *Private Enforcement*, at 109-113. *See also Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 660 (3d Cir. 1976) ("(T)here is no authorization to block a citizen's suit . . . even though the agency believes that the suit should not go forward.")

to recover their fees upon prevailing. Simply put, there is nothing to indicate that Congress intended to distort the balance in the adversary process by providing well-funded citizen plaintiffs considerable incentives to sue, while chilling the advocacy of a defendant to vindicate its rights by forcing it to risk paying both its own attorney's fees and those of the plaintiff.

This case presents a rare opportunity for the Court to address the apparent principal reason why citizen plaintiffs have come close to displacing governmental agencies as the primary enforcers of environmental laws – the unequal and, *amici* suggest, unfair treatment courts apply when ruling on petitions for attorney's fees under the environmental fee-shifting provisions. The Court should grant the petition to determine whether the *Christiansburg* standard should continue to apply to prevailing environmental citizen suit defendants.

CONCLUSION

The Ninth Circuit's decision promotes disproportion and unfairness in the prosecuting and defending of environmental citizen suits. This disparity places regulated entities in an untenable position by subjecting them to an imbalance of power in these cases. To ensure fair treatment in this important area of federal law, this Court should grant the writ of certiorari and determine whether the *Christiansburg* standard should continue to be applied to the citizen suit fee-shifting provisions of environmental statutes.

Respectfully submitted,

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